

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-1503

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THE UNITED STATES OF AMERICA

Plaintiff-Appellee

VS.

GLENN BANKS

Defendant-Appellant

Appeal from the United States District Court For The
Western District of New York

REPLY BRIEF FOR
DEFENDANT-APPELLANT

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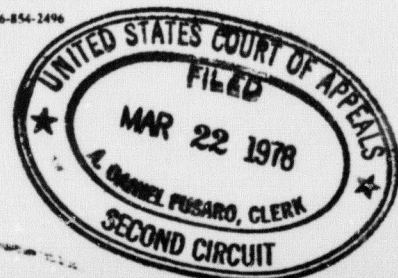


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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

-vs-

NO. 77-1503

GLENN BANKS

Defendant-Appellant

REPLY BRIEF FOR DEFENDANT-APPELLANT

ARGUMENT

Reply to Point I

The Governments' answer to Point I of appellants' brief is a fragmented and simplistic interpretation of the Fourth Amendment. The Governments' suggestion that the requirements of the Fourth Amendment are not applicable because the activities of Gray, Petronella and the rest of its highly organized team of operatives was merely a "preliminary investigation" to "establish probable cause" to arrest Mr. Banks rather than a "search and seizure in the constitutional sense" has been repudiated by the Supreme Court as a much too restrictive interpretation of that Amendment:

"'Search' and 'seizure' are not talismans. We therefore reject the notions that the Fourth Amendment does not come into play at all as a limitation upon police conduct if the officers stop short of something called a 'technical arrest' or a 'full-blown search!'" Terry v. Ohio 392 U.S. 1, 19 (1968).

"But to argue that the Fourth Amendment does not apply to the investigatory stage is fundamentally to misconceive the purposes of the Fourth Amendment. ---nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry---." Davis v. Mississippi 394 U.S. 721, 726 (1969).

"The basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." Camara v. Municipal Court 387 U.S. 523, 528 (1967).

What was alleged in appellants' motion while not a "full-blown search" in the sense of the police breaking into a citizens home and rummaging about or in the sense of officers accosting a citizen on the street and turning out his pockets looking for contraband, was a variety of "wholesale intrusion" or "arbitrary invasion" equally impermissible under the Fourth Amendment. The principles of constitutional law applicable to appellants' Fourth Amendment claim are well settled and appellant should not have been denied an opportunity to establish

that claim merely because apparently no factually similar case has yet been presented to a Federal Court. The Supreme Court has recognized that the applicability of the Fourth Amendment may be limitless:

"Countless other cases which have come to this Court over the years have involved a myriad of differing factual contexts in which the protections of the Fourth Amendment have been appropriately invoked. No doubt the future will bring countless others. By nothing we say here do we either foresee or foreclose factual situations to which the Fourth Amendment may be applicable." Hoffa v. United States 385 U.S. 311, 301-302 (1966)

In Camara v. Municipal Court, surpa, the Supreme Court, in discussing the kind of analysis to be used in evaluating governmental conduct in intruding upon its citizens, even with a warrant, used a factual example which is helpful in considering the applicability of Fourth Amendment standards to the facts alleged in appellants motion:

"---'probable cause' is the standard by which a particular decision to search is tested against the constitutional mandate of reasonableness. To apply this standard it is obviously necessary first to focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen. For example, in a criminal investigation, the police may undertake to recover specific stolen or contraband goods. But that public interest would hardly justify a sweeping search of an entire city conducted

in the hope that these goods might be found. Consequently, a search for these goods, even with a warrant, is 'reasonable' only where there is 'probable cause' to believe that they will be uncovered in a particular dwelling." 387 U.S. 523, 534-535.

The allegations in appellants' motion are quite analogous to the foregoing example. He alleged, in essence, a sweeping governmental search of an entire area of the City of Buffalo for persons who could be induced to purchase contraband, rather than for contraband itself, which was conducted merely in the hope that such persons might be found but without probable cause. The Governments' assertion in its brief that :

"It was the investigation which gave rise to the probable cause---", puts the cart before the horse. Clearly the probable cause to intrude upon a citizen must precede the intrusion under the Fourth Amendment.

Should appellants' allegations have been established in an evidentiary hearing on his motion the Governments' case against him might well have failed since the motion was directed not only to suppressing the money and tape recorded conversations referred to in the Governments brief, but also "all of the fruits" of the alleged Fourth Amendment violation. (Appendix 205). Such "fruits" include a wide variety of potential evidence including, inter alia, not only tangible property but also

verbal evidence of observations made and conversations overheard by government witnesses. WongSun v. United States 371 U.S. 471, 484-486 (1963).

The Governments' additional contentions in Point 1 of its brief are equally unsupportable. To say that there was no invasion of Mr. Banks' right to privacy under the Fourth Amendment because "overtures of the agent were neither oppressive or overbearing" is absurd. Certainly the Fourth Amendments' prohibition against arbitrary governmental invasions upon citizens applies to subtle as well as more flagrant varieties of governmental activity. The governments' claim that appellants place of business and abutting street "is not the kind of protected area which is contemplated by the Fourth Amendment" is no longer a viable doctrine of Constitutional law. See Brief For Defendant-Appellant pp. 22-23

Certain sweeping statements made in the Governments' brief find no support in the present record. These include that to accept appellants' Fourth Amendment premise "would overextend the notion of privacy to the point where it would unrealistically hamper police activities" and that those activities here were really only a "preliminary investigation" based upon "newspaper articles and other sources." It may well be that the police

activities would be unrealistically hampered or that the information from those articles and "other sources" would provide an adequate constitutional basis upon which to sustain the governments' activities in this case, but those are among the matters for which an evidentiary basis should have been established on a suppression hearing had an opportunity been afforded in the District Court. Consequently both parties were denied opportunities in this regard. The trial, of course, was not an appropriate forum for developing the kind of evidence necessary to sustain either party's position in the suppression motion. That was the proper and necessary function of the denied evidentiary hearing on appellants suppression motion. Brinegar v. United States 338 U.S. 160, 172-173 (1949).

Reply to Point II

The Governments' answer to Point II of appellants' brief is an attempt to distract attention from the main thrust of appellants' contention by interjecting red herring and straw man premises into the argument. Appellant submits that if the Governments' intrusion upon him to solicit the commission of crime was not founded upon a permissible Fourth Amendment basis, the Fifth Amendment Due Process theory of entrapment should be applied in this case.

The Governments' argument that its activities were not "shocking to the conscience" because "infiltration" was necessary as the only practicable means of detecting food stamp abuses overlooks the complete absence in the record of any evidence showing that in approaching Mr. Banks they had any reason to believe they were infiltrating an on-going known criminal enterprise. It is only where a pre-existing and known criminal enterprise has been infiltrated that the Federal Courts have sanctioned "infiltration".

The Governments' argument that the consummation of four sales by Mr. Banks is evidence of predisposition ignores the fact that such occurred only after its "infiltration" and that there is no evidence in the record showing that the Government had reason to believe that he was a predisposed criminal before the "infiltration". It is what is known before not what is discovered after the Governmental intrusion that determines the Fourth Amendment issue. See Ker v. California 374 U.S. 23 (1963), Terry v. Ohio 392 U.S. 1 (1968).

While the transcripts inserted into the Governments brief, particularly "Tape II" and "Tape III", might be adverse to appellant if he were arguing a lack of evidence of predisposition theory, they are not relevant to the second argument in his brief since they shed absolutely no light on

what the Governments' operatives knew about him at the time they initiated their "infiltration". The Governments' conclusion in Point II of its brief that "---the government has met its burden of showing defendant's predisposition by demonstrating his 'ready and willing' participation in the illegal conduct" merely creates a false issue while ignoring the real issue.

Appellants' arguments under Point II of his brief should be considered independently of those in Point I. While the present record does not contain sufficient facts to determine the suppression issue since no hearing was had, appellant submits it does contain sufficient facts to determine the Fifth Amendment issue. The Government had an opportunity at trial to make a record to justify its conduct under the Fifth Amendment. It failed to do so, particularly when it failed to call Gray, the man who initiated the "infiltration" of Mr. Banks life, the one witness who might have been competent to testify why Mr. Banks was selected for solicitation. That being so appellant submits that his Fifth Amendment argument should be decided on the present record, with the Government bearing the consequences of inadequacies in the proof arising out of the complete absence of any evidence to even suggest there was a permissible Fourth Amendment basis for the intrusion upon Mr. Banks to solicit commission of a crime.

Reply to Point III

Appellant is in agreement with the Governments' basic premise that: "There is no rule which requires consistency in the thought process of the jury so long as their verdict is consistent with the evidence presented." Appellant submits however, that even viewing the evidence most favorably to the Government, the verdict was not consistent with the evidence presented and that his motion for acquittal should have been granted.

The Government acknowledges that the jury could have "rationally concluded that there was some doubt as to Count One," but that "there was no continuous course of conduct on the part of the government" so as to require a lack of predisposition finding on the other three counts. Appellant submits that the only possible rational interpretation of the evidence clearly shows only a continuing course of Governmental conduct covering all four transactions such that Mr. Banks later "predisposition" for the last three transactions was merely a product of the Governments' initial inducement of an unpredisposed man and not attenuated from it.

The juries' verdict on the last three counts was not consistent with the facts as they evidently found them to be in their consideration of Count One. Appellant submits such inconsistency

between evidence and verdict was the product of the prolix and confusing change in the District Court.

Dated: Buffalo, New York
March 17, 1978

Respectfully submitted,

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

Plaintiff

-vs-

DOCKET NO. 77-1503

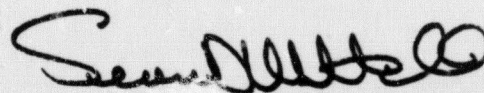
GLENN BANKS

Defendant

STATE OF NEW YORK)
COUNTY OF ERIE) SS:
CITY OF BUFFALO)

SEAN D. M. HILL, being duly sworn, deposes and says:

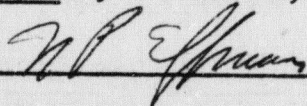
That, on the 20th day of March, 1978, he personally
served the appellant's reply ^{and} in the captioned matter upon
EDWARD J. WAGNER, Assistant United States Attorney, by
leaving ~~three~~ ^{two} (2) copies thereof with his receptionist
in the United States Attorney's Office, United States
Courthouse, Buffalo, New York, 14202.



SEAN D. M. HILL

Sworn to before me this

20th day of March, 1978.



NORMAN F. EFFMAN
Notary Public, State of New York
Qualified in Erie County

My Commission Expires 3/31/78

